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Realizing the Dream: United States v. State of Louisiana

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Realizing the Dream: *United States v. State of Louisiana*

> It is one thing to agree that the goal of integration is morally and legally right; it is another thing to commit oneself positively and actively to the ideal of integration—the former is intellectual assent, the latter is actual belief. These are days that demand practices to match professions. This is no day to pay lip service to integration, we must pay life service to it.[1]

It has been over twenty years since Dr. Martin Luther King, Jr. spoke these famous words. Yet today, we are still only paying lip service to integration, especially in the area of higher education. It has been thirty-five years since the United States Supreme Court held, in *Brown v. Board of Education*,[2] that the maintenance of "separate but equal" educational institutions was unconstitutional. This holding was based on earlier decisions by the Supreme Court declaring that separate institutions of higher education for blacks and whites were unequal and therefore unconstitutional.

At the time of *Brown* almost all of the states had either de jure or de facto separate educational facilities for whites and blacks. Louisiana was one of those states. In fact, it was one of Louisiana's laws that originally led the Supreme Court to uphold the "separate but equal" doctrine.[3] The feeling that whites and blacks should not mix was deeply rooted in both the black and white segments of society.

For the past fifteen years the desegregation of Louisiana's system of higher education has produced ongoing litigation. On August 2, 1988,[4] a three-judge panel held that Louisiana was operating a dual system of higher education and set a date to discuss possible remedies. On July 19, 1989,[5] the court rendered its opinion and order to desegregate Louisiana's system of higher education. A surprising part of the court's plan calls for the merger of the law schools at L.S.U. and Southern University. None of the parties had argued in favor of this merger nor had they expected it.

This comment will discuss the court's order to merge the two law schools. First, there will be a brief discussion of Louisiana's system of

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1. C. King, The Words of Martin Luther King, Jr., at 40 (1987).
2. 347 U.S. 483, 74 S. Ct. 686 (1954) [hereinafter *Brown I*].
3. See Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896).
4. United States v. State of Louisiana, 692 F. Supp. 642 (E.D. La. 1988).
5. United States v. State of Louisiana, 718 F. Supp. 499 (E.D. La. 1989).

higher eduction as it existed in the past and as it currently stands with respect to desegregation under the "freedom of choice" admissions policy, specifically focusing on the public law schools at L.S.U. and Southern University. The article will then discuss the basis for the court's finding of liability. The article will conclude with a discussion of the court's choice of remedies and why this writer thinks that the court's decision was correct.

BACKGROUND

Louisiana's System of Higher Education

Prior to *Brown*, the State of Louisiana established and maintained a dual system of higher education based upon race. Two of the major institutions in the system were (and still are) Louisiana State University (L.S.U.) and Southern University (Southern).

L.S.U. was established in 1859 and has been in continuous operation since that time except for a short period during the Civil War. It was established at a time when blacks were enslaved and were not allowed to attend public schools. The Department of Law was established in 1906. Admission to the law school was limited to whites. From the time of its establishment until 1950, it was the official policy of the L.S.U. Board of Supervisors that no black students could attend the law school at L.S.U.

Southern University was established in 1880, fifteen years after blacks were emancipated in the Civil War. Admission was limited to blacks. The Department of Law was established in 1947 pursuant to the State Board of Education's recommendation that there be a bona fide law school for blacks.[6]

In 1950, the equality of the two law schools was challenged for the first time in *Wilson v. Board of Supervisors*.[7] Roy S. Wilson, a black man, applied for admission to the L.S.U. Department of Law. His application was timely and complied with all of the rules and regulations governing the admission of students. Although he possessed all of the qualifications required for admission, he was not accepted because Louisiana had established a law school for blacks at Southern. The Federal Court for the Eastern District of Louisiana, finding that the two schools were not equal in the ability to educate lawyers, held that, by denying his application for admission, L.S.U. had violated Mr. Wilson's fourteenth amendment right to equal protection.[8] Yet, even after this case,

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6. See Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950).

7. Id. Wilson enrolled in the Fall of 1951 for non-credit courses. He never received his grades and did not register again in the Spring of 1952.

8. Id. at 989.

L.S.U. did not change its admission policy of excluding blacks. It was not until some time after the enactment of the Civil Rights Act of 1964 that Louisiana discontinued its official recognition of the state universities as single race institutions. Despite this change in law, institutions of higher learning in Louisiana have remained racially identifiable.

Louisiana's Current System of Legal Education

Louisiana currently has seventeen general state institutions of higher learning governed by four separate boards.[9] The Board of Regents has general responsibility for planning, coordinating and reviewing the budgets and academic programs offered by each state institution. The remaining three boards have separate direct management authority for a number of the universities. The Louisiana State University Board of Supervisors ("L.S.U. Supervisors") oversees the L.S.U. system, including the Paul M. Hebert Law Center on the main campus in Baton Rouge.[10] The Southern University Board of Supervisors ("Southern Supervisors") oversees the Southern University system, including the Southern University Law Center, also in Baton Rouge.[11] Like the schools they administer, the governing boards have been and remain racially identifiable. The Southern Board of Supervisors has four whites (22%) and fourteen blacks (78%). The L.S.U. Board of Supervisors has four blacks (22%) and fourteen whites (78%).[12]

The two law schools, however, present remarkably different racial proportions. As of 1988, the Southern Law Center had a student population that was 58% black and 42% white. On the other hand, the L.S.U. Law Center is almost totally a one-race institution with a student population that is 96% white and 4% black. The present percentage of blacks is higher than it has been at any time during the Consent Decree, when the percentage was consistently 1%.[13] The faculty at Southern Law Center is equally staffed between white and black professors, while at

9. See P. Verkuil, Special Master Final Report to the District Court, at 11 (1989) [hereinafter Report].

10. The L.S.U. system includes Louisiana State University and Mechanical College in Baton Rouge, Louisiana State University in Shreveport, Louisiana State University in Alexandria, Louisiana State University in Eunice, and University of New Orleans.

11. The Southern system includes Southern University in Baton Rouge, Southern University in New Orleans, and Southern University at Shreveport/Bossier City. The other institutions are governed by the Board of Trustees for State Colleges and Universities. They are Louisiana Tech University, Grambling State University, University of Southwestern Louisiana, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana University, McNeese State University, Nicholls State University, and Delgado Community College.

12. Report, supra note 9, at 14.

13. Statistical data compiled by the L.S.U. Law Center's admission office on November 2, 1989. A replica of this data is attached.

L.S.U. there are only two blacks on the faculty, which is composed of forty-two full time professors.

The two law schools also differ in many other respects, including their admission standards. Both schools require that their applicants hold an undergraduate degree from an accredited college or university. However, at L.S.U. applicants are also required to obtain a minimum index based on their Law School Admission Test (LSAT) and undergraduate grade point average.[14] Presently, those applicants that obtain an index of ninety-six are admitted. In contrast, Southern only requires that their applicants have a minimum of a 2.0 ("C") average in courses having "substantive academic content."[15] The applicant must also have an acceptable score on the LSAT.[16]

Events Leading Up to This Suit

In 1969-70, the U.S. Department of Health, Education and Welfare (HEW) examined ten states that had previously operated dual systems of public higher education to determine whether their educational systems had in fact become desegregated.[17] All were found to be operating dual systems in violation of Title VI of the Civil Rights Act of 1964. HEW requested that each of these states submit an acceptable plan for desegregation. Louisiana, claiming that it did not operate a dual system, refused to do so.

On March 14, 1974, the United States Attorney General filed suit against the State of Louisiana and the state agencies of higher education[18] pursuant to the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964.[19] The United States claimed that the State of Louisiana had established, maintained, and perpetuated

14. The index is the sum of the LSAT score multiplied by two and the undergraduate GPA multiplied by 10. For example, an LSAT score of thirty-three and an undergraduate GPA of 3.0 would produce an index of ninety-six (96). If the LSAT is taken more than once, the highest LSAT score is used in computing the index.

15. The phrase "substantive academic content" is left undefined.

16. What is an "acceptable" score on the LSAT is also left undefined.

17. This was pursuant to Adams v. Richardson, 356 F. Supp. 92 (D.D.C.), aff'd as modified, 480 F.2d 1159 (D.C. Cir. 1973).

18. United States v. State of Louisiana, 527 F. Supp. 509, 512 (1981). The original defendants were the State of Louisiana, the Louisiana Board of Education, the Louisiana Coordinating Council for Higher Education, and the Louisiana Board of Regents. In March of 1986, following the restructuring of Louisiana's higher education boards by the Louisiana Constitution of 1974, the parties jointly moved to substitute the following defendants in place of the original named defendants: The State of Louisiana, the Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees of State Colleges and Universities.

19. 42 U.S.C. 2000(d), 2000(d)-1 (1982).

an unlawful dual system of higher education based on race. The United States sought to dismantle the dual system through a detailed desegregation plan. A three-judge[20] panel was organized on April 16, 1974 to hear the case pursuant to 28 U.S.C. sections 2281[21] and 2284.[22]

On September 8, 1981,[23] after seven years of pre-trial conferences and negotiations, a Consent Decree was proposed by both parties. Subsequently, on November 30, 1981, the court approved the Consent Decree. According to the terms of the decree, the defendants committed themselves to: (1) shaping the process of admissions and recruitment to increase the number of "other-race" students,[24] (2) solving the problem of student attrition (especially with respect to "other-race" students),[25] (3) resolving the issues and problems arising out of program duplication, and the allocation of program curricular offerings among the state's institutions,[26] (4) understanding the appropriate role of historically black colleges and making provisions for their enhancement,[27] and (5) taking substantial steps to achieve a more equitable balance in the racial composition of the staff, faculty, and governing boards of the university system. A timetable and goals were also set for increasing "other-race" participation in every aspect of the university system's life.[28]

Pursuant to these goals, the L.S.U. Law Center was to strive for a minimum of 7.5% blacks in its student body by the 1987-88 school term.[29] There was no particular goal set for the Southern University Law Center. Both law centers were to actively seek applications from qualified "other-race" students. There was no indication that any academic standards would be changed. The Decree was effective until December 31, 1987. The court's jurisdiction was to terminate on December 31, 1987, unless the United States moved to declare that Louisiana was in violation of the Decree.

The United States so moved in December 1987. In the papers filed on that motion, all parties agreed that: (1) Louisiana had operated a

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20. The panel consisted of John M. Wisdom (Circuit Judge), Charles Schwartz, Jr., and Veronica D. Wicker (District Judges).

21. Repealed by Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976).

22. 28 U.S.C. 2284 (1982) states:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

23. United States v. State of Louisiana, 527 F. Supp. 509 (E.D. La. 1981).

24. Consent Decree, United States v. Louisiana, CA-80-3300, Aug. 29, 1981, at 5.

25. Id. at 8.

26. Id. at 14.

27. Id. at 17.

28. Id. at 15.

29. Id. at Table 3 (appendix).

de jure segregated system of public higher education prior to the enactment of Title VI; (2) it had not implemented all the provisions of the 1981 Consent Decree; and (3) almost all of the state's institutions of higher education remained racially identifiable.[30] The United States, along with the predominantly black institutions in the state, argued that unlawful vestiges of the state's former *de jure* segregated system will remain unless the state spends the additional money contemplated under the Decree. Louisiana responded that the full implementation of the Decree would actually promote segregation,[31] and that Louisiana had made sufficient good faith efforts to warrant a dismissal of the entire suit.[32]

By a decree dated August 2, 1988, the three judges held that the state's freedom of choice policy, allowing a student to choose which college he would attend, was insufficient to demonstrate that Louisiana was not operating an unlawful dual college system based upon race. Noting that several of the schools were more segregated in 1987 than they had been when the Consent Decree was entered in 1981,[33] the panel declared the Decree ineffective. The court then found, by summary judgment, that Louisiana was in violation of Title VI and set a date to discuss the issue of other or additional remedies that would be required to achieve a unitary system.

After further litigation, the court rendered an opinion and order, dated July 19, 1989,[34] aimed at desegregating the higher education system in Louisiana. Among others, the order called for the following actions:

> 1) The elimination of the four boards[35] and organization of the state's higher education system under one unified board.
> 2) The designation of Louisiana State University as the research university in the state university system and recognition of it as Louisiana's flagship university.[36]
> 3) Creation of a Community College system to insure remedial education of those individuals who might be excluded from a traditional four-year college system.[37]
> 4) Reduction of unwarranted duplicated programs, especially legal education. The Court ordered the merger of the state's

30. United States v. State of Louisiana, 692 F. Supp. 642, 644 (E.D. La. 1988).

31. Louisiana argued that full implementation of the consent decree would only serve to make the "black" schools more attractive to black students, which would result in a less overall integrated university system.

32. Id.

33. Id. at 657.

34. United States v. State of Louisiana, 718 F. Supp. 499 (E.D. La. 1989).

35. Id. at 515.

36. Id. at 516.

37. Id. at 518.

two public law schools located at Southern and L.S.U. The newly merged law school was ordered to maintain a minimum of 10% minority students.[38]

All parties appealed to the United States Supreme Court. Justice Byron White granted a temporary stay of the order. The full Court subsequently made the stay permanent pending its decision as to whether it would hear the case in its next term. On January 5, 1990, the Supreme Court decided that it did not have jurisdiction to hear the case and remanded it to the Fifth Circuit.[39]

ANALYSIS

Does Brown *Apply to Higher Education?*

Prior to *Brown*, there were six U.S. Supreme Court cases involving the "separate but equal" doctrine in the area of public education.[40] Four of these cases were concerned with higher education. In each case inequality was found because there were specific benefits enjoyed by white students that were denied to black students of the same educational qualifications. Thus, in none of the cases did the Court find it necessary to re-examine the constitutionality of the "separate but equal" doctrine in order to grant the requested relief.

The most notable of these cases was *Sweatt v. Painter*.[41] Herman Sweatt applied for admission to the University of Texas Law School. Although he possessed all of the academic qualifications for admission, Sweatt's application was rejected solely because he was black. At the time Sweatt submitted his application, Texas law did not permit blacks and whites to go to school together, and there was no law school in

38. Id. at 514 and 518.

39. Louisiana, ex rel Guste v. United States, 110 S. Ct. 708 (1990); Board of Supervisors of Southern University v. United States, 110 S. Ct. 708 (1990); Louisiana, ex rel Roemer v. United States, 110 S. Ct. 708 (1990).

40. See McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S. Ct. 851 (1950); Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848 (1950); Sipuel v. Board of Regents, 332 U.S. 631, 68 S. Ct. 299 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S. Ct. 232 (1938); Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91 (1927); and Cumming v. Board of Education, 175 U.S. 528, 20 S. Ct. 197 (1899).

41. 339 U.S. 629, 70 S. Ct. 848 (1950). See also McKissick v. Carmichael, 187 F.2d 949 (4th Cir. 1951), another pre-*Brown* decision involving higher education. Plaintiff filed suit seeking admission to the University of North Carolina School of Law. Plaintiff's application, like Sweatt's, was denied because North Carolina's laws, as was the law in Texas, prohibited blacks from attending school with whites. The Fourth Circuit stated: "The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail." 187 F.2d at 954.

Texas that admitted blacks.[42] Sweatt sued the university, seeking a writ of mandamus to compel his admission. The State of Texas then established an obviously inferior separate law school for blacks at Texas Southern Law School. In requiring the University of Texas to admit Sweatt to its law school, the Supreme Court declared, "petitioner may claim his full constitutional right; legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the state."[43]

In *Sweatt* the Court made special note of the following attributes of law schools: (1) size and quality of the faculty, (2) size of the student body, (3) size and quality of the library, and (4) availability of law reviews, moot court facilities, scholarship funds, and Order of the Coif affiliation.[44] In these areas, the Court noted that "the University of Texas Law School was superior to the newly formed law school" for blacks.[45] A comparison of the law schools at Southern and L.S.U. reveals that in these respects, the disparity between the two schools is not as great as in *Sweatt*.[46] But the inquiry does not end here. The *Sweatt*

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42. The state trial court recognized that the state violated Sweatt's constitutional right of equal protection by depriving him of a legal education. However, the court continued the case for six months to allow the state to supply a law school for blacks. At the end of the six months, the trial court denied Sweatt's petition upon a showing by the state that it had established a law school for blacks at Texas Southern University. Sweatt then alleged that the two schools were not "equal." Finding that the new school offered Sweatt the same privileges, advantages, and opportunities for the study of law that white students enjoyed at the University of Texas, the trial court again dismissed Sweatt's suit. The Texas Court of Appeals affirmed the lower court decision and the Texas Supreme Court denied plaintiff's writ of error. However, because of the important constitutional issues involved, the United States Supreme Court granted certiorari. Sweatt v. Painter, 338 U.S. 865, 70 S. Ct. 139 (1949).

43. *Sweatt*, 339 U.S. at 635, 70 S. Ct. at 851.

44. Id. at 632, 70 S. Ct. at 849.

45. Id. at 633, 70 S. Ct. at 850.

46. The law library at L.S.U. is a comprehensive legal research facility. It has the largest collection of materials in Louisiana, including computer-assisted legal research. The library houses more than 460,000 volume equivalents, which include over 350,000 bound volumes and some 550,000 microforms. It also holds about 90,000 court records, and its current serial subscriptions exceed 4,600. The collection contains the statutes and reports of federal and state jurisdictions in the United States, as well as extensive collections of law journals, citators, digests, encyclopedias, and treatises. There are also substantial collections of comparative, international, and foreign law, including materials from Europe, Latin America, and countries of the British Commonwealth. Computer services provide on line access to bibliographic and legal information databases, including *Lexis*, *Westlaw*, and *Stairs*. The library is a U.S. government document depository and a Louisiana state document depository for the records and briefs of the Louisiana Supreme Court and the Courts of Appeal.

Southern Law Library contains approximately 230,000 volumes and offers research assistance and reference services to students, faculty, and the general public. The library

Court went on to say that "*[w]hat is more important*, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[47] Some of these qualities enumerated by the Court were: (1) reputation of the faculty, (2) position and influence of the alumni, (3) standing in the community, (4) traditions, and (5) prestige.[48] There is no question of a great disparity between the two law schools in favor of L.S.U.'s law school when these *more important* qualities are considered.[49]

There are also some objective criteria available that further reveal the disparity between the two law schools. For instance, L.S.U. graduates consistently lead the state in bar passage rate with a 90% success rate while Southern graduates have consistently remained below 50% in passage success.[50] In terms of job placement L.S.U. graduates usually obtain the better paying and more prestigious jobs.[51] These considerations were not available in the *Sweatt* case because the law school for blacks was newly formed. Nevertheless, they do reflect the inequality in legal training offered by the two law schools.

*Post-*Brown *Developments*

In *Brown*, the Court relied on language found in *Sweatt* to find that there were several intangible qualities of a school that are incapable of objective measurement that make for greatness in a school. By stating that such principles apply with added force in elementary and secondary

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is adequate to support the curriculum and conforms to the standards of the American Bar Association and of the Association of American Law Schools. Both the federal and the Louisiana State governments have designated the Southern University Law Library an official depository for government documents. The library contains more than 450 titles of periodicals with several more added each year. A collection of microforms and tapes dealing with a wide range of legal subjects, as well as computerized research through *Westlaw* is available.

Southern University Law School also has moot court and its own law review. Unlike L.S.U.'s law school, however, it does not have a chapter of the Order of the Coif, a national organization recognizing outstanding achievement in legal education.

47. *Sweatt*, 339 U.S. at 634, 70 S. Ct. at 850 (emphasis added).

48. Id. at 634, 70 S. Ct. at 850.

49. In the past, the L.S.U. Law Center has had such renowned faculty members as Wex Malone (deceased) and Paul M. Hebert (deceased), and currently, Professors William Hawkland and Saul Litvinoff. The Law Center houses the Center for Civil Law Studies and the Louisiana State Law Institute, both highly influential organizations which recommend laws to the state legislature. L.S.U. graduates are recognized for outstanding legal training both within Louisiana and in surrounding states. Graduates from L.S.U. are heavily recruited by law firms in Texas and other southern states as well as for judicial clerkships with both the federal and state court systems.

50. U.S. v. State of Louisiana, 718 F. Supp. 499, 513 (E.D. La. 1989).

51. See infra text accompanying notes 98-99.

schools, the Court implicitly recognized that these principles are applicable to institutions of higher learning. The Supreme Court's school desegregation opinions following *Brown* have all concerned primary and secondary education. Nevertheless, the lower courts have also been consistent in holding that this constitutional mandate to dismantle racially dual systems applies in the higher education context as well.[52] Hence, the state's duty to eliminate the vestiges of state imposed segregation is just as exacting in the context of higher education as it is in elementary and secondary school systems.[53] It is only the means of eliminating this segregation which differs. The duty to remove all vestiges of *de jure* segregation is the same.[54]

Opponents of this view point out that, unlike primary and secondary schools, no one is compelled to attend an institution of higher learning. Thus, in higher education "freedom of choice" for the individual to attend whatever institution he chooses is enough for equal protection purposes. This distinction, however, while it may affect the specific remedial actions that may be required, does not relieve the state of its constitutional duty under the Fourteenth Amendment. This is so because "the fundamental interests that support a State's police power in the primary and secondary school context nonetheless still exist with all their force and reasoning for the higher education context."[55] Hence, while a state may have no duty to provide institutions of higher learning, nor compel attendance by its citizens, if a state chooses to enter the arena of higher education by providing state supported colleges and universities, then it has a duty under the equal protection clause to treat all of its citizens the same without regard to race. This includes an affirmative duty "to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'"[56]

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52. See, e.g., Geier v. Alexander (*Geier II*), 801 F.2d 799 (6th Cir. 1986); Geier v. University of Tennessee (*Geier I*), 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886, 100 S. Ct. 180 (1979); Lee v. Macon County Bd. of Educ., 453 F.2d 524 (5th Cir. 1971); Norris v. State Council of Higher Educ. for Virginia, 327 F. Supp. 1368 (E.D. Va.), aff'd sub nom (per curiam without written opinion). Board of Visitors of the College of William and Mary in Virginia v. Norris, 404 U.S. 907, 92 S. Ct. 227 (1971).

53. In *Geier I*, 597 F.2d at 1065, the Sixth Circuit stated: "We conclude that the *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels." In *Geier II*, the Sixth Circuit, quoting the above language from *Geier I*, found that Tennessee had an affirmative duty to dismantle its prior *de jure* dual system of higher eduction. In *Lee*, 453 F.2d at 527, the Fifth Circuit stated: "It is the responsibility of state authorities to eliminate the racial character of [its institutions of higher education]. . . . Failure or neglect will require further judicial scrutiny and the consideration of additional remedies."

54. *Geier I*, 597 F.2d at 1065.

55. See United States v. State of Louisiana, 692 F. Supp. at 656 (E.D. La. 1988).

56. See Milliken v. Bradly (*Milliken II*), 433 U.S. 267, 289-90, 97 S. Ct. 2749, 2762 (1977) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 91 S. Ct. 1267, 1275 (1971)).

"Freedom of Choice"

As stated, it has been suggested by others that the courts should not apply the standards of *Brown* to higher education. Rather, they argue that the proper standard to be applied is the "freedom of choice" standard the U.S. Supreme Court approved in *Alabama State Teachers Association v. Alabama Public School and College Authority (ASTA)*[57] and *Bazemore v. Friday*.[58] In *Bazemore*, black employees and the United States brought an action against the North Carolina Agricultural Extension Service alleging a pattern and practice of racial discrimination. The Extension Service operated 4-H clubs for youths in the community schools. Prior to the Civil Rights Act of 1964, the clubs were designated as "white only" or "black only." The 4-H clubs provided their members with educational materials and training in various areas of agriculture and home economics. The clubs met during regular school hours. By a five to four decision,[59] the Court, noting that membership in the clubs was voluntary, and there were no rules prohibiting any one from joining any club of his choice, held that the racial identity of the clubs was the result of "free choice" and that the Constitution did not require more.

The majority distinguished the circumstances in *Bazemore* from those in *Green v. Board of New Kent County*,[60] in which the Court had held that "voluntary" choice programs in public schools were inadequate and that the schools had to take affirmative actions to integrate their student bodies. The *Bazemore* Court stated that "[w]hile school children must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while School Boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join."[61]

While there have been no U.S. Supreme Court decisions that have applied the *Bazemore* standard to institutions of higher education, some lower courts have done so.[62] One such case is the recently reversed

57. 289 F. Supp. 784 (M.D. Ala. 1968), aff'd mem., 393 U.S. 400, 89 S. Ct. 681 (1969).

58. 478 U.S. 385, 106 S. Ct. 3000 (1986).

59. Id. at 407, 106 S. Ct. at 3012.

60. 391 U.S. 430, 88 S. Ct. 1689 (1968).

61. *Bazemore*, 478 U.S. at 408, 106 S. Ct. at 3013.

62. See, e.g., Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), reversed, 893 F.2d 732 (1990); *ASTA* supra; Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (per curiam, en banc) (suggesting that the existance of all black public colleges is not only unconstitutionally permissible, but also crucial for the viable training of minority students).

decision in *Ayers v. Allain*.[63] In this case the United States alleged that the State of Mississippi had established, maintained, and perpetuated a racially separate system of public higher education for its black and white citizens. The institutions, which had formerly been designated to serve only blacks, were markedly inferior to the institutions established to serve whites only. Although these schools now have a "freedom of choice" admissions policy, the plaintiff alleged that the state continued to maintain and perpetuate an unlawful dual system of higher education because the previously "black only" institutions had remained predominantly black and the previously "white only" institutions had remained predominantly white.

The district court made note of the fact that the State of Mississippi had instituted racially neutral admission standards for all of its universities and colleges. Citing *ASTA* and *Bazemore*, the court stated that the scope of affirmative duty in higher education does not extend as far as in elementary and secondary education and concluded that the duty to disestablish or dismantle a dual higher education system is fulfilled by the adoption and implementation of "good faith non-discriminatory policies."[64]

The Fifth Circuit rejected the district court's analysis[65] under *Bazemore* and adopted the Sixth Circuit's analysis in *Geier* stating that "[t]he outcome in *Bazemore* may [] rest on the absence of evidence of discrimination. In contrast, the record in the present case is replete with the disease."[66] The distinction sustained by *Bazemore* is based on student choice, or conversely, that students are not compelled to attend college. It assumes that black students possess the same freedom to choose as do white students. Contrary to *Brown*, however, this assumption ignores the effects of past de jure segregation.[67] Further, the Fifth Circuit noted that the freedom of choice standard employed in Mississippi perpetuated segregation because it made it easier for blacks to be admitted to a black school and the historically white institution did not invite attendance of blacks. The situation is the same in Louisiana. It is easier for blacks to attend Southern Law Center because the admission standards are not as tough as those at L.S.U. Law Center. At the same time, blacks were not encouraged to attend L.S.U.[68]

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63. 674 F. Supp. 1523 (N.D. Miss. 1987).

64. *Ayers*, 674 F. Supp. at 1552.

65. Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990).

66. Id. at 745.

67. Id. at 752.

68. The Fifth Circuit noted that admission was based on the ACT scores. A minimum score of fifteen was required for automatic admission to historically white schools, while only a minimum score of nine was needed for admission in historically black institutions. A comparison of L.S.U. and Southern's admission standard is discussed above.

"Freedom of Choice" is Not Enough

In considering the question of liability, the court in *Louisiana v. United States* considered the standards of both *Brown* and *Bazemore*. The court noted that there is a dispute over whether the scope of the duties in higher education is as broad as has been defined and applied in the context of elementary and secondary schools. It realized that some courts have found states to have satisfied their duties in higher education by implementing good faith, racially neutral policies and practices whereby students are free to enroll where they wish, even where there continued to exist racially identifiable institutions within the state's system of higher education. On the other hand, it noted that some courts have required more.[69]

In *Geier v. Alexander*,[70] the Sixth Circuit affirmed the district court's approval of a consent decree using racial quotas for certain student recruitment in a university desegregation suit.

Rejecting the argument that *Green* does not control higher education because the decision to attend is voluntary, the court, quoting *Geier*, in *United States v. State of Louisiana* explained:

> It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies . . . . Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved requires us to reexamine these holdings.[71]

It is true that states are not required by the U.S. Constitution to establish and maintain public institutions of higher education. However, if a state chooses to create and maintain such institutions, it must administer them without regard to race.[72]

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69. See, e.g., *Geier I*, 597 F.2d 1056, 1067 (6th Cir.), cert. denied, 444 U.S. 886, 100 S. Ct. 180 (1979) and Norris v. State Council of Higher Educ. for Virginia, 327 F. Supp. 1368, 1372 (E.D. Va.), aff'd sub nom (per curiam without written opinion). Board of Visitors of the College of William and Mary in Virginia v. Norris, 404 U.S. 907, 92 S. Ct. 227 (1971).

70. 801 F.2d 799 (6th Cir. 1986).

71. United States v. State of Louisiana, 692 F. Supp. 642, 655 (E.D. La. 1988) (quoting *Geier II*, 801 F.2d 799, 805 (6th Cir. 1986)).

72. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331 (1982).

The State of Louisiana has chosen to create the law schools at L.S.U. and Southern University. However, it has failed to administer them without regard to race. As mentioned earlier, the Southern Law Center is and has been controlled by the Southern Board of Supervisors, which has a black majority, and the L.S.U. Law Center is and has been controlled by the L.S.U. Board of Supervisors, which has a white majority. L.S.U. has remained basically a one race school since the official recognition by the state as a "white only" school was removed from the state statutes.

The state has put forth little effort to increase enrollment of minority students at L.S.U. It has, in recent years, attempted to affirmatively recruit black applicants, an effort that was aided by minority tuition waivers. In 1988, the state appropriated funds for minority tuition waivers in an effort to recruit minority students. However, this was done only after the district court had found that Louisiana was in violation of the Consent Decree and had failed to dismantle its dual higher educational system.

Southern, on the other hand is basically integrated in terms of student population and faculty. However, Southern's undergraduate student body population and faculty has remained predominantly black. This indicates that the racially balanced student body of Southern Law Center is more a result of Southern's relaxed admission standards than on the equality of the two schools. In other words, whites that attend Southern do so because it is easier to get in, not because they consider the law school at Southern equal to the law school at L.S.U.

Another glaring statistic indicating that the two institutions are not of equal quality is the bar passage rate of each school. Graduates of L.S.U. law school have consistently led the state in bar passage (approximately 90%), while Southern graduates have consistently been last in the state in bar passage (consistently under 50%). Even this disparity may understate the reality faced by black students at Southern. As the district court found, "[t]he Southern bar passage rate is probably influenced by the higher success rate of its white students." However, even the passage rate of Southern's white students is not as high as L.S.U.'s.[73] This pattern has existed for quite some time; nevertheless, the state has failed to rectify the situation. No one would expect that the bar passage rates would be exactly equal. It should be expected, however, that if the law schools at Southern and L.S.U. were substantially equal in the quality of legal education provided, the end result (bar passage rates) would be similar.

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73. Report, supra note 9, at 97, n.28.

Remedy

Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially on the local school authorities to remedy the effects of this segregation.[74] Only the default of the state and school authorities obligates the court to employ the help of appointed experts and masters to establish an adequate plan of its own. Once the court finds that the defendants have been operating an unlawful dual system of education, the court is obligated to remedy this wrong. An abiding concern must be to assure that minority students are afforded an equal opportunity to get an education.

According to the provisions of the 1981 decree, a goal was set to equate the proportion of qualified black Louisiana residents who graduate from undergraduate institutions in the state and enter state graduate and professional schools with the proportion of qualified white state residents who graduate from state institutions and enter state graduate and professional schools.[75] The public institutions of higher education had committed themselves to actively recruit other-race students to increase their percentage enrollment in student populations. During the six-year existence of the decree, however, there was only a 1% increase of other-race students at L.S.U.[76] In discussing the failure to attain the goals of the Consent Decree, the court specifically pointed to L.S.U.'s Law Center. It stated, "During the period of the consent decree, [the percentage of black students] ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent."[77]

The goal of the court in a desegregation case is to eliminate state-imposed isolation of minorities within the school system. The remedy must convert a "'dual' system to one without a white school and a [black] school, but just schools."[78] The remedy should eliminate conditions likely to produce racially identifiable schools. It must go beyond an order that forbids further acts of affirmative discrimination in order to assure that the past discriminatory practices will work no further harm.[79]

The district court, in the case at hand, imposed a plan that consists of a racially conscious remedy in conjunction with a merger of the two law schools.

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74. Brown v. Board of Education (*Brown II*), 349 U.S. 294, 75 S. Ct. 753 (1955).

75. Report, supra note 9, at 4.

76. The overall percentage of other-race students increased from 23.6% to 24.5%. See Report, supra note 9, at 13.

77. 718 F. Supp. at 513.

78. Morgan v. Kerrigan, 401 F. Supp. 216, 230 (D. Mass. 1975).

79. Id. at 231.

Racially Conscious Remedies

The effects of past discrimination in the school system will not go away on their own. Without promotional quotas, the continuing effects cannot be eliminated.[80] Historically, policies that ignore race can have the effect of perpetuating the effects of the past segregation practices.[81] The desegregation remedy must therefore offer more than superficial neutrality. It has to meet and neutralize the effects of past discrimination. Courts have stressed that a desegregation remedy must do more than give effect to the free choice of students when the effect of these choices is simply to maintain the segregation of the past.[82]

However, as the Supreme Court has recently reminded us, race conscious remedies are disfavored. Before a racially conscious remedy can be imposed, it must be determined that there is a compelling state interest. One must then look to several factors, including: the necessity of the relief and the efficacy of an alternative remedy; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant student population; and the impact of the relief on the rights of third parties.[83] The use of racial quotas must remain subject to continuing scrutiny to assure that it will work the least harm possible to other "innocent" persons competing for the benefit.

Compelling State Interest

Societal discrimination alone is insufficient to justify the use of race-conscious remedies. Some showing of prior discrimination on the part of the defendant is required before such remedies are allowed. In *Sheet Metal Workers International Association v. EEOC*,[84] the Supreme Court noted that the sheet metal union had a long history of discriminating against nonwhites.[85] The union had been sued by the EEOC several times. The Court stated, "In light of the [union's] long history of 'foot

80. United States v. Paradise, 480 U.S. 149, 163, 107 S. Ct. 1053, 1063 (1987).

81. Green v. Board of New Kent County, 391 U.S. 430, 440, 88 S. Ct. 1689, 1695 (1968).

82. *Morgan*, 401 F. Supp. 216, 231. See also *Green*, 391 U.S. at 440, 88 S. Ct. at 1695; Monroe v. Board of Commissioners, 391 U.S. 450, 88 S. Ct. 1700 (1968).

83. *Paradise*, 480 U.S. at 471, 107 S. Ct. at 1067.

84. 478 U.S. 421, 106 S. Ct. 3019 (1986).

85. In 1964, the New York State Commission for Human Rights determined that Local 28 was excluding nonwhites. It had never included any black or Jewish members. Admission to the union was conducted largely on non-work related factors, including a nepotistic basis, requiring sponsorship by an incumbent union member. The union was ordered to cease their racially discriminatory practices. See State Commission for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (N.Y. Sup. Ct. 1964). In 1965 the Commission had to bring charges to enforce the 1964 court order. Subsequent actions were filed by the Commission in 1965, 1966, and 1967. Finally in 1971, the United States stepped in and brought federal charges against the union.

dragging resistance' to court orders, simply enjoining [the union] from once again engaging in discriminatory practices would clearly have been futile. Rather, the [d]istrict [c]ourt properly determined that affirmative race-conscious measures were necessary to put an end to petitioners' discriminatory ways."[86]

This principle was again recognized in *University of California Regents v. Bakke*.[87] Bakke, a white male, had been denied admission to medical school. He contended that he was denied the opportunity to compete for all the positions because of a voluntary action program initiated by the university. Justice Powell, speaking for the Court, held that after a court has determined that there is a violation of constitutional rights of a suspect class, then the government's interest in preferring members of the injured group at the expense of others is substantial, especially since the legal rights of the victims must be vindicated.[88]

In *Brown*, the Court stated, "To separate blacks from others of similar age and qualifications solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way that is unlikely ever to be undone."[89]

Necessity

In order to justify the use of suspect classification, it must be shown not only that the purpose and interest of the state is both constitutionally permissible and substantial, but also that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest.[90] In this case, the racial quota purports to insure that there is a significant attempt by the merged law school to recruit and retain blacks. This requirement is necessary in light of the negative past history of L.S.U. in attracting and retaining blacks at its law school. It had been the policy and law of Louisiana from the time the law school was established in 1906 until the enactment of the Civil Rights Act of 1964, that blacks would not be allowed to attend L.S.U. Since the decision in *Brown*, the State of Louisiana and the law school at L.S.U. have done very little to change the policy even though the law prohibiting the attendance of blacks has been removed from the books.

It has also been shown that the freedom of choice policy that has been in effect in Louisiana has failed to achieve the desired result of eliminating the racial identity of the law schools. This is true even if

86. *Sheet Metal Workers*, 478 U.S. at 477, 106 S. Ct. at 3050.
87. 438 U.S. 265, 98 S. Ct. 2733 (1978).
88. 438 U.S. at 305, 98 S. Ct. at 2756.
89. *Brown*, 347 U.S. at 493, 74 S. Ct. at 691.
90. Wygant v. Jackson Board of Educ., 476 U.S. 267, 106 S. Ct. 1842 (1986).

the racial makeup of Southern Law Center is considered. Although Southern Law Center's student body is roughly 42% white, this can be explained by the fact that the admission standards at Southern are not as stringent as those at L.S.U. Law Center. This means that the high percentage of whites at Southern Law Center is not so much a result of the freedom of choice admission policy as it is a result of the lower admission standards at Southern. However, the opposite cannot be said for the blacks at L.S.U. Law Center. Assuming that they meet the requirements for admission at L.S.U., then they automatically meet the requirements for admission at Southern, because the admission standards are higher at L.S.U. Therefore, the decision of those blacks that attend L.S.U. is truly a "free choice" because they could have attended either school that they wanted to attend.

Narrowly Tailored Remedy

The scope of a remedy is determined by the nature and extent of the constitutional violation. A race-conscious remedy is narrowly tailored to remedy past discrimination if its implementation results, or is designed to result, in the admission of a sufficient number of minority students so that the racial balance of the student body approximates roughly the balance that would have been achieved absent the past discrimination.[91]

The racially conscious remedy imposed by the court in *United States v. Louisiana* is designed to accomplish this goal. However, one may suspect that the 10% minority quota is too low. According to the Special Masters Report, Louisiana's population is approximately 29% black. Blacks also represent 28% of the total students entering college in any given year.[92] The data compiled also indicates that only about 33.2% of all the students, black and white, that enter college graduate within six years. There was no data on the percentage of blacks that graduate in comparison to whites. Assuming that the percentages are consistent, then the percentage of blacks that are qualified to attend law school in any given year would still be 28%. Therefore, while the court had a good idea in imposing the racial quota, it did not go far enough.

One must also look at the effect that a racially conscious remedy would have on "innocent parties." The "innocent parties" in this case will be those non-minority students that will not be admitted to the newly merged law school in any given year because of the quota. This does not entail a serious disruption of their lives because the student is not losing anything that he had a vested right in, and therefore, the

91. See id. at 279, 106 S. Ct. at 1850 and compare with Valentine v. Smith, 654 F.2d 503, 510 (8th Cir. 1981).

92. Report, supra note 9, at 15-17.

remedy is permissible.[93] In other words, as long as no student is being removed from a position that he has been granted in order to make room for a minority, racial quotas are permissible.[94] Instead, that student is being postponed or encouraged to apply to another law school. In *United States v. Paradise*,[95] the United States Supreme Court approved a desegregation plan ordered by the district court that required the State of Alabama to hire and promote their state troopers on a one to one ratio until blacks represented 25% of the state troopers. The Court looked at the fact that no white trooper was being fired to make room for black troopers. Also, no whites were being denied a promotion because of the order. Their promotions were only being postponed.

Another requirement of a racially conscious remedy is that it be flexible. The plan called for by the court in *United States v. Louisiana* did not mention any flexibility. However, if it can be shown that the newly merged law school has a legitimate reason for not living up to the requirements of the order,[96] the court will probably not penalize it as long as there has been a good faith attempt to satisfy the requirements. Besides, quotas should not be etched in stone. There will be some years when there will not be enough qualified applicants to reach the quota. This will be acceptable if, in years when there are more qualified applicants than the quota requires, more than the quota calls for are admitted.

Racially Conscious Remedy Alone Did Not Work

The Consent Decree stated that the L.S.U. Law Center would strive to reach a minimum of 7.5% minority students by 1988. L.S.U. did not even come close. One of the reasons could be a lack of effort on behalf of L.S.U. A substantially equal reason can be traced to the existence of a public black law school across town, which attracts blacks because of social pressures and the general feeling based upon historical fact that they are not welcome at L.S.U. Law Center.

Unless there is some incentive to go elsewhere, students will usually attend the institution that their parents attended because of tradition and they will normally feel comfortable there. While it is true that L.S.U. has had scholarships available to those students that were financially unable to attend law school, minority students attending L.S.U. have to compete with other non-minority students for these scholarships. There is nothing wrong with blacks having to compete with whites for

93. See *Wygant*, 476 U.S. 267, 106 S. Ct. 1842 (1986); *Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987).

94. Cf. *Wygant*, 476 U.S. 267, 106 S. Ct. 1842 (1986).

95. 480 U.S. 149, 107 S. Ct. 1053 (1987).

96. See *Paradise*, 480 U.S. at 177, 107 S. Ct. at 1070.

scholarships; however, in light of the L.S.U. Law Center's lack of success in attracting black students, scholarships exclusively for minorities would provide an incentive for blacks to attend. It was not until the Fall of 1988 that the L.S.U. Law Center initiated scholarships aimed at recruiting minority students. This was done, however, after the district court had declared that the L.S.U. Law Center along with the rest of Louisiana's higher education system was in violation of the Supreme Court mandate not to operate a dual system. Even with the scholarships, other measures are needed.[97]

The Merger

By merging the law schools at Southern and L.S.U., the court has accomplished the goal of eliminating conditions likely to produce racially identifiable schools. Some might say that the merger was not necessary in this case. However, given the lack of success of the "freedom of choice" policy on admissions in Louisiana, and the unlikelihood that any other method would succeed, the merger is the only means of accomplishing this goal. As the court noted on August 4, 1989, a "court's power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable power."[98]

This flexibility regarding remedies has been especially recognized in the context of legal education. Almost forty years ago in *Sweatt*, the Supreme Court recognized that a state's predominantly white law school might possess a far greater number of those qualities that make for greatness in a law school than a state's predominately black law school. These qualities, which are beyond objective measurement, include the reputation of the faculty, the position and influence of alumni, and the prestige of the school. The same immeasurable qualities that the Court in *Sweatt* found were possessed by the University of Texas, but not by Texas Southern University, are also possessed by L.S.U., but not by Southern.

One way to measure the success of a school is to examine the placement of its graduates. The L.S.U. Law Center places 89% of its graduates within six to nine months of graduation. Twelve percent of those graduates are placed with large law firms; 39% with small to medium law firms; 2% with corporations and businesses; 17% in governmental employment; 25% with judicial clerkships; 2% with solo practice; and 20% find other types of employment. Starting salaries

97. See the discussion of *Sheet Metal Workers*, supra text accompanying notes 84-86.

98. United States v. Louisiana, 718 F. Supp. 525, 534 (E.D. La. 1989).

range from $20,000 to $105,000 with an average salary of $31,200 per year.[99]

Southern, on the other hand, places 50% of its graduates in governmental service. Another 20% are placed with public-service and public-interest organizations, and 20% go into solo practice. The remaining 10% is split with 3% taking judicial clerkships and 7% taking other employment. Starting salaries range from $15,000 to $38,000 with an average starting salary of $18,000.[100]

Another of those immeasurable qualities that make for greatness in a law school is the reputation of the faculty. While both Southern and L.S.U. have good teaching instructors, the faculty at L.S.U. enjoys a greater reputation. Also, L.S.U. faculty members head the Center of Civil Law Studies and the Louisiana State Law Institute, both of which are located at the L.S.U. Law Center.

Where the extent of the constitutional deprivation is great and other milder remedies have failed, courts have found the merger of educational institutions to be appropriate.[101] In *Geier v. Blanton*,[102] there existed a predominantly black institution and a predominantly white institution in the same city. Tennessee State University (TSU) was initially established under state statute as an institution for blacks only, whereas the University of Tennessee was established for whites only. An action was brought to enjoin the University of Tennessee-Nashville from constructing a proposed expansion. The plaintiffs argued that the proposed expansion would affect the efforts of TSU to desegregate its student body and faculty. In response, the court ordered the defendants to submit a plan to desegregate both the black and white institutions. The submitted plan called for the white institutions to recruit black students and faculty and for the black institutions to recruit white students and faculty. After the plan had been in effect for eight years the court concluded that it had not worked and showed no prospect of working. The court then ordered the merger of TSU and UT-N.

The *Geier* court was concerned with whether it had surpassed the bounds of its broad remedial powers by ordering a merger, especially in light of the Supreme Court's decision in *Austin Independent School District v. United States*.[103] In *Austin*, the Supreme Court vacated and remanded the Fifth Circuit Court of Appeals approval of a requirement of extensive cross-town busing to achieve a certain degree of racial balance in every school. The Supreme Court held that the lower court

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99. E. Epstein, J. Shostak & L. Troy, Barron's Guide to Law Schools, 136 (8th ed. 1988).

100. Id. at 175.

101. See Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977).

102. Id.

103. 429 U.S. 990, 97 S. Ct. 517 (1976).

had abused its remedial powers, which may only be used (1) in the face of a constitutional violation and which, if used, (2) may not exceed the effect of the constitutional violation. In ruling that the merger had met this standard the court in *Geier* stated:

> In the initial stages of this case, the first criterion was met: the establishment by State statute of a dual system of higher education was a blatant constitutional violation. The second criterion has also been met: merger does not exceed what is necessary to eliminate the effect of the statutory scheme. Eight years under the State's method is proof that a stronger remedy is required. Certainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for [N]egroes. Merger is a drastic remedy, but the State's actions have been egregious examples of constitutional violations.[104]

The facts surrounding *United States v. Louisiana* are analogous to the facts in *Geier*. There is no dispute that the State of Louisiana once operated a *de jure* dual system of education at all levels including higher education. The jurisprudence has stated that this is a "blatant constitutional violation," thereby meeting the first criterion as established by the *Geier* court.

The second criterion, that the remedy not exceed the effects of the violation, has also been met. Here, as in *Geier*, the state was given an opportunity to eliminate the effects of the prior *de jure* dual system. This litigation has been pending since 1974. A Consent Decree was entered into in an attempt to settle the dispute. After six years under the decree, the racial identity of the institutions had remained unchanged. In some instances, the situation had become worse. Surely the state has had the opportunity to solve the problem but has failed to do so. A stronger solution is needed to remedy the efforts of the racially identifiable dual system of legal education in Louisiana.

Following the August 2, 1988 decision, the Court ordered that proposed remedial plans be submitted by each party. The State of Louisiana's plan included an aggressive provision to eliminate program duplication. It called for academic transfers and exclusive assignment of high demand programs. The state hoped that by exclusively assigning certain programs to one school, students wishing to study that particular field would have no choice but to attend that school rather than being able to choose between a predominantly black institution and a predominantly white institution.[105] The United States, as well as Southern,

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104. *Geier*, 427 F. Supp. at 660.

105. Report, supra note 9, at 24.

also recommended program transfers and exclusive assignment of some programs to one or the other school in the same area.[106]

Merging Southern Law Center with L.S.U. Law Center will have the same effect. Southern University will still exist. However, students wishing to study law at a state supported school will have to attend the newly merged law school instead of choosing between Southern and L.S.U. This is no different from exclusively assigning a particular professional or graduate program, such as pharmacy or chemistry, to one or the other school.

How Will the Merger Be Implemented

A major concern of those who oppose the merger as well as those in favor of the merger is how it will be implemented. What will be the standards at the new merged school? If the admission requirements are not lowered, how will it affect those students, which are mostly minority, who cannot meet those admission requirements? Is this just another way of wiping out minority lawyers? Can L.S.U. be trusted to admit and retain minorities? The district court failed to give any guidance on implementation other than to say that it is to take place over a five-year period.

One of the views that has been discussed is the establishment of a two-tier admission criteria. Those applicants that are able to meet the regular requirements will be admitted for a regular program with the attendant first year course requirements. Those applicants that are not able to meet the regular academic requirements but still demonstrate the potential to complete law school will be selectively admitted. These students will be allowed to progress through the law school curriculum at a slower pace. The exit standards to graduate will be the same for both sets of applicants, thereby maintaining the present status of the school in the legal community.

Another idea is to simply have an admission standard that is somewhere between what the two schools now have. Some might think that this will lower the status that L.S.U. has worked so hard to achieve. This will not be the case if the exit standards are maintained. L.S.U. did not earn its reputation on the quality of its entering freshmen, but on the quality of its graduating lawyers. As long as the academic standard for the student while he is in law school is the same, this reputation will not change.

A second concern is what will happen to those students that are not able to meet the admission requirements (whatever they may be) of the newly merged law school? Undoubtedly, some of those students will be minority students. However, the court order did specify that 10%

106. Id. at 27, 31.

of the spaces are to be reserved for minority students, some of which will not meet the regular admission requirements.

This court order is not a method of wiping out black lawyers. In effect, what it will do is instill in the mind of the public that all of the lawyers who are educated in Louisiana law schools are equally qualified to practice law. Law firms that interview for jobs will be more inclined to hire minorities than they are now, which will result in comparable entry level positions for both black and white lawyers.

Finally, it is contended that L.S.U. cannot be trusted to admit and retain black law students. The court was concerned with this and ordered that a monitoring committee be established to see to it that all of its orders were being implemented. However, the order only called for the *admission* of blacks to the law school. Once blacks have been admitted, they will have to compete on the same level as the whites there for grades. L.S.U., or any school for that matter, does not owe blacks or any other race a guarantee that they will graduate. A degree must be earned.

CONCLUSION

In cases involving higher education, an open door policy, coupled with good faith recruiting efforts, as well as provisions for remedial education for the educationally underprivileged, is sufficient *as a basic requirement* to eliminate the vestiges of former *de jure* systems. However, this basic requirement is not enough in those situations in which it fails to accomplish the ends sought. Stronger remedies are required.

In the case at hand, the basic requirements surely have failed to accomplish the goals set out under the Consent Decree. Something more was desperately needed. The court, sensing this need for a stronger remedy, took the appropriate steps to solve the problem of unequal legal education in the State of Louisiana. The case has now been passed to the Fifth Circuit. They have the opportunity to settle the issue of what role the states are to take in desegregating their systems of higher education. Reversing this decision will have the effect of sending this nation back to the days of "separate but unequal."

Darrell K. Hickman

L.S.U. Law Center
Graduates
1971-Present

Year	Total Graduates	Blacks
1971	132	0
1972	164	0
1973	238	1
1974	291	4
1975	254	4
1976	285	2
1977	293	7
1978	282	4
1979	260	3
1980	216	1
1981	202	4
1982	221	9
1983	212	3
1984	195	1
1985	206	4
1986	186	1
1987	187	5
1988	218	2
1989 (May & August)	185	0
TOTAL	4227	55

L.S.U.
Black Enrollment
1971-Present

Year	Total Enrollment	Total Blacks Enrolled	%	Total Freshmen	Total Black Freshmen	%
Fall '89	783	34	4%	315	25	7%
Fall '88	783	24	3%	372	23	6%
Fall '87	711	11	1%	267	9	3%
Fall '86	723	9	1%	285	2	.7%
Fall '85	718	14	1%	306	7	2%
Fall '84	689	12	1%	250	7	2%
Fall '83	737	10	1%	301	5	1%
Fall '82	807	12	1%	354	6	1%
Fall '81	879	15	1%	374	3	.8%
Fall '80	857	27	3%	376	14	3%
Fall '79	863	15	1%	376	10	2%
Fall '78	890	16	1%	334	9	2%
Fall '77	989	13	1%	371	7	1%
Fall '76	1023	25	2%	386	14	3%
Fall '75	1038	21	2%	407	12	2%
Fall '74	953	19	1%	377	12	3%
Fall '73	943	14	1%	369	7	1%
Fall '72	855	6	.7%	315	1	.3%
Fall '71	916	7	.7%	498	6	.1%
TOTAL	16,157	304	1.9%	6,633	179	2.7%